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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

WAYMO LLC,  
  
Plaintiff,  
  
v.  
  
UBER TECHNOLOGIES, INC.,  
OTTOMOTTO LLC; OTTO TRUCKING  
LLC,  
  
Defendants.

Case No. 3:17-cv-00939-WHA

**DEFENDANTS UBER  
TECHNOLOGIES, INC. AND  
OTTOMOTTO LLC'S SUR-REPLY TO  
MOTION TO COMPEL UBER SOURCE  
CODE**

Trial Date: December 4, 2017

**REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**

## 1 I. INTRODUCTION

2 Waymo's reply brief adds nothing to its failed attempt to justify new discovery and, in  
 3 fact, further undermines its motion. Waymo's new argument is that former Waymo engineer Don  
 4 Burnette developed the *Ottomotto* motion planner source code with a [REDACTED] planning  
 5 architecture that uses [REDACTED] controls, which Waymo claims are also found in the  
 6 current Uber code. But Waymo has had access to the Ottomotto code using [REDACTED]  
 7 controls, for *nearly two months*, and it identified no trade secrets derived from Waymo code.  
 8 Waymo fails to show why *Uber's* current source code (which was not written by Mr. Burnette)  
 9 should be produced when Waymo has already reviewed the [REDACTED] controls in the  
 10 Ottomotto code and failed to find any alleged trade secrets.

11 Further, Waymo has no answer to the controlling legal principle under Cal. Civ. Proc.  
 12 Code § 2019.210, that it cannot take discovery of Uber source code and then subsequently invent  
 13 trade secrets to match. Tellingly, Waymo still has not identified any claimed trade secrets in  
 14 connection with its motion planner software. Waymo touts two source code files from Mr.  
 15 Burnette's computer as "clearly proprietary" to Waymo, but these files are not Waymo's code.  
 16 Waymo could easily have compared the two files to its own code, but it has provided no such  
 17 evidence. Moreover, Waymo makes no effort to establish that the files even contain information  
 18 that would qualify as trade secret. Even a cursory search shows that [REDACTED] are  
 19 common physics concepts used in motion planning. Waymo's motion should be denied.

## 20 II. ARGUMENT

21 Mr. Burnette's recent deposition testimony does not support Waymo's motion to compel  
 22 production of Uber source code. To the contrary, Mr. Burnette's testimony confirms that the  
 23 [REDACTED] controls on which Waymo is now focusing are in the *Ottomotto* planner code  
 24 that Waymo has had for nearly two months. All the testimony cited by Waymo relates to Mr.  
 25 Burnette's work on "the *Otto* motion planning approach," specifically a [REDACTED]  
 26 [REDACTED] that uses [REDACTED] control techniques. (Reply at 1-2 (emphasis added).) Mr.  
 27 Burnette has not written any *Uber* source code. (Ex. 1, 8/18/17 Burnette Dep. 53:1-3; Ex. 2,  
 28 Burnette Rough 8:2-8.) Waymo already learned from Mr. Burnette's August 18 deposition that

1 Ottomotto's planner used a [REDACTED] where all variables are [REDACTED]  
2 [REDACTED] (Ex. 1, 8/18/17 Burnette Dep. 55:25-56:21.) The Ottomotto source code, which Waymo  
3 has inspected for over 134 hours since August 17, implements the [REDACTED] controls  
4 discussed in Mr. Burnette's testimony. (Burnette Decl. ¶ 4 (excerpting Ottomotto planner code).)  
5 Waymo did not identify any of its alleged trade secrets in the Ottomotto code or claim that [REDACTED]  
6 [REDACTED] are Waymo proprietary concepts. (Dkt. 1976-4, Mot. at 4.) Nor does Waymo make  
7 any attempt in its reply brief to establish that those concepts are Waymo trade secrets. But in any  
8 event, even were Waymo to claim that [REDACTED] or [REDACTED]  
9 were its trade secrets, such allegations would not support discovery of *Uber's* current source code  
10 when Waymo already has access to the Ottomotto code implementing those concepts.

11 Waymo does not dispute that it seeks to review Uber's source code first and then draft  
12 new trade secrets to match, but it has no answer to Section 2019.210's prohibition against  
13 "commencing discovery relating to the trade secret" before plaintiff has identified the actual trade  
14 secret. Cal. Civ. Proc. Code § 2019.210; *compare* Dkt. 1990-10 at 2-3, *with* Reply at 3.  
15 Waymo's reply brief does not fix this fatal flaw, as it does not identify any alleged trade secrets  
16 within the code at issue.

17 Waymo argues that Mr. Burnette "evaded" admissions on two files on his computer from  
18 after Mr. Burnette left Google, but these files are not Waymo source code. (Reply at 2.) The two  
19 files are short header files that bear no Waymo markings and do not contain any actual  
20 algorithms. (Ex. 2, Burnette Rough, 184:25-186:4; Burnette Decl. Exs. A and B (attaching  
21 files).) Though it touted retaining experts to compare Waymo code to code at Stroz "almost  
22 every day" since October 2, Waymo cites no evidence that the two files on Mr. Burnette's  
23 computer were, in fact, Waymo's source code. Waymo offers no comparison between actual  
24 Waymo source code and these two files, and makes no showing that these files contain trade  
25 secrets. (*Cf.* Mot. at 3.) The variables in one header file refer to general physics concepts used to  
26 define trajectory for any robotic system, such as [REDACTED]  
27 [REDACTED] (Ex. 2, Burnette Rough, 97:10-22; 186:5-187:8; Burnette  
28 Decl. ¶ 5.) A cursory search shows textbooks and self-driving software courses that use [REDACTED]

1 [REDACTED] in motion planning. (*Id.*) Waymo offers no expert or engineer testimony that the  
2 publicly known concepts [REDACTED] are Waymo trade secrets, rather than basic physics.

3 Waymo also argues that Mr. Burnette's February 10 handwritten notes showed that he  
4 "created" the Ottomotto motion planning approach a day after leaving Waymo, contending  
5 Mr. Burnette "admitted" that Uber's current planner uses the same technique he created at  
6 Waymo. (Reply at 1-2.) This argument is contrary to Mr. Burnette's testimony. Mr. Burnette  
7 said he jotted down some ideas for a plan controller implementation before going on vacation, so  
8 that Ottomotto colleague Jur van den Berg could consider them in his absence. (Ex. 2, Burnette  
9 Rough, 75:13-76:1.) He testified that Uber's motion planner uses [REDACTED] variables, as  
10 did Waymo's, but explained that these variables are basic physics dynamics variables for  
11 describing trajectory. (*Id.* 29:9-25, 77:17-78:4.) Waymo offers no evidence that the basic  
12 concepts in these notes contain Waymo trade secrets.

13 Waymo quibbles with Mr. Burnette's previous testimony that Ottomotto's planner was  
14 fundamentally different from Waymo's, despite no contrary evidence (e.g., code comparison), by  
15 pointing to Mr. Burnette's work at Waymo on an abandoned [REDACTED] planner. (Reply at 2;  
16 Ex. 2, Burnette Rough, 94:2-17.) Mr. Burnette explained, however, that the general concept of a  
17 [REDACTED] planner is well-known. (Ex. 2, Burnette Rough, 26:1-10; 89:9-15.) Waymo makes no  
18 showing that the broad concept of a [REDACTED] planner is trade secret.

19 Finally, to revive its "source code snippets" basis for discovery, Waymo argues that  
20 presentations to outside [REDACTED] visitors were "stamped" confidential, but it has  
21 produced no evidence of NDAs that would actually preserve confidentiality. (*Cf.* Reply at 3;  
22 Opp'n at 5.) Nor has it shown that anything in those code snippets qualifies as a trade secret.

### 23 III. CONCLUSION

24 Waymo continues to be in fishing expedition mode, with its newest basis for discovery  
25 being the publicly known [REDACTED] variables that were in the Ottomotto source code  
26 Waymo has had for two months. Waymo's accusations of copying are unsupported by any  
27 evidence, its demands for carte blanche discovery before identifying even one software trade  
28 secret are improper, and any new discovery into Uber's source code should be denied.

1 Dated: October 15, 2017

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2  
3 By: /s/ Michael A. Jacobs

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